

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
SEVENTH REGION**

**HCR MANOR CARE, d/b/a ARDEN COURTS<sup>1</sup>**

**Employer**

**and**

**CASE 7-RC-22556**

**LOCAL 79, SERVICE EMPLOYEES  
INTERNATIONAL UNION, AFL-CIO**

**Petitioner**

**APPEARANCES:**

Clifford H. Nelson, Attorney, of Atlanta, Georgia, for the Employer.  
Leola H. Banks, of Detroit, Michigan, for the Petitioner.

**DECISION AND DIRECTION OF ELECTION**

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, a hearing was held before a hearing officer of the National Labor Relations Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding<sup>2</sup>, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

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<sup>1</sup> The name of the Employer appears as amended at the hearing.

<sup>2</sup> The Employer and Petitioner filed briefs, which were carefully considered.

2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The labor organization involved claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Sections 2(6) and (7) of the Act.

The Petitioner seeks to represent a unit of approximately 40 full-time and regular part-time service and maintenance employees, including cooks, housekeepers, program service assistants, and resident care givers; but excluding all registered nurses (RNs), licensed practical nurses (LPNs), managers, office clerical employees, guards and supervisors as defined in the Act. The Employer contends that three resident care givers, who are designated by the Employer as senior care givers, are supervisors within the meaning of Section 2(11) of the Act. The Employer additionally asserts that two administrative services assistants should be included in the unit. The Petitioner responds that the senior care givers are not supervisors within the meaning of the Act, and the administrative services assistants should be excluded from the unit as office clerical employees who do not share any community of interest with the petitioned-for employees.

I find that the record is insufficiently conclusive to permit a ruling regarding the asserted supervisory status of the senior care givers. As the record fails to demonstrate with specificity whether any of these three employees fall within the supervisory parameters of Section 2(11), the senior care givers will be allowed to vote subject to challenge by either party. I further find that the administrative services assistants are akin to receptionists and, as they do not perform distinct business office duties such as handling finances, billing, and extensive personnel functions, they shall be included in the unit.

## **Overview**

The Employer operates a 60-bed licensed home for the aged and provides nursing care to its residents with memory-related disorders such as dementia and Alzheimer's disease. The one-story facility consists of four residential wings in each corner, designated as House A, B, C, and D. The central area consists of a community center, craft room, beauty salon, and health center. There is an administrative area located in the front lobby portion of the building.

Director K.C. Henricks manages the facility. The nursing department is headed by the resident services coordinator (RSC), which position is currently vacant. There are

also two resident services supervisors (nurse supervisors) in the nursing department: RN Sally Novak and LPN Kathy Ringel. Marketing Director Merav Jacobson is in charge of marketing at the facility. The administrative services coordinator is Jeannine Day. The program services coordinator is Eloise Gordon. The food service coordinator is Mason Kilgore. The building services coordinator is Adrione Crabbe<sup>3</sup>.

## **The Senior Care Givers**

### **Scheduling, Transfers, and Assignments**

The facility operates three 8-hour round the clock shifts. The day shift is from 7:00 a.m. to 3:00 p.m.; the afternoon shift is from 3:00 p.m. to 11:00 p.m.; and the midnight shift is from 11:00 p.m. to 7:00 a.m. There are 28 care givers assigned to the day, afternoon, and midnight shifts. There is one senior care giver on each shift: Angela Tate is the day shift senior care giver; Hattie Walker is the midnight shift senior care giver; and the afternoon senior care giver position is currently vacant.

There are generally two care givers assigned to each house on the day shift; one to two care givers assigned to each house on the afternoon shift; and one care giver assigned to each house on the midnight shift. Generally, the director and RSC are present at the facility during the day shift hours. Additionally, there is always a nurse supervisor, either LPN Novak or RN Ringel, on duty until 7:00 to 8:00 p.m.<sup>4</sup>. From about 8:00 p.m. to 7:00 a.m., the senior care giver is the highest ranking employee at the facility. However, there is always a nurse supervisor on-call during the evening hours.

When there is adequate staffing of care givers, the senior care giver assigned to the shift will generally act as a “float” care giver and rotate among the four houses. When there is not adequate staffing of care givers, the senior care giver works in the house where needed as a care giver and engages in direct patient care duties.

When the RSC or nurse supervisor is present at the facility, all scheduling and staffing issues are handled by them without involvement of the senior care givers. When the RSC or nurse supervisors are not on duty, the senior care giver is responsible for ensuring adequate nursing department staffing of the houses. In this regard, the senior care giver may direct the transfer of a care giver from one location to another for adequate coverage or may call in care givers to work from an employee list. The senior care giver uses her discretion in determining which care givers to call in to work. The senior care giver may also request a care giver to stay past her designated shift or allow a

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<sup>3</sup> Although the parties did not stipulate to the supervisory or managerial status of the above individuals, it appears from the record that the parties are in agreement that they should be excluded from the unit based on their supervisory and/or managerial status.

<sup>4</sup> The record indicates that LPN Ringel generally works the day shift. The record is not clear regarding the work hours of RN Novak.

care giver to leave early. However, the record is clear that the senior care givers cannot mandate employees to come in to work during their non-scheduled work time or to stay beyond their scheduled work time.

The day shift nurse supervisor, LPN Ringel, prepares a daily assignment sheet for the day shift which designates their work station only. The record does not demonstrate who prepares the work place assignment sheets for the afternoon and evening shifts. It appears that job assignments made to the care givers are not designated on any assignment sheet or schedule. Rather, they are routine in nature and do not change.

### **Patient Care, Overseeing and Directing Work of Care Givers**

The care givers are responsible for providing residents with general nursing care, such as meal provisions, meal clean-up, bathing, toileting, laundry, hourly resident checks, stocking adequate supplies on the floor, and passing of medications<sup>5</sup>. The senior care givers routinely assist other care givers in the four houses with patient care duties and, when there is not adequate staffing of care givers, the senior care giver fills in where needed and performs patient care duties. They also on occasion have filled in for cooks and in housekeeping.

For the most part, there is adequate care giver staffing on a day-to-day basis. When there is adequate staffing, the senior care giver assigned to the shift will generally act as a “float” care giver and rotate throughout the four houses. As a float, the senior care giver “makes rounds,” which entails traveling among the four houses and making sure the houses are adequately staffed and supplied. In this regard, the senior care giver is responsible for overseeing the work of and assisting the care givers in their direct patient care duties. The senior care givers also ensure that the care givers’ tasks are being completed. During the course of making rounds, the senior care giver may address any family-related concerns raised by residents’ family members.

### **Discipline**

In the event that a senior care giver observes that a care giver is not doing an assigned task, such as laundry, the senior care giver may verbally notify the RSC or nurse supervisor regarding the problem. It is then up to that supervisory official as to whether any disciplinary action is warranted. If a discipline-related problem occurs when the RSC or nurse supervisor is not present at the facility, the senior care giver may note the problem for later review by a higher management official.

On one occasion, an afternoon shift senior care giver, who is no longer employed by the Employer, conducted an independent investigation on her own regarding an

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<sup>5</sup> All care givers may pass medications as long as they have been trained by the Employer regarding proper procedures.

employee who was assertedly being abusive to a resident and decided to remove the employee from the facility without consultation with anyone else. The record does not address any follow-up investigation of the incident or what disciplinary action, if any, resulted. There is also some limited record evidence raised by an employee witness which suggests that the senior care givers recently started issuing verbal warnings and disciplinary write-ups to employees.

When an employee fails to punch in at the time clock, he/she is provided with a “missed punch form.” The record indicates that day shift senior care giver Tate recently signed off as “supervisor” on three missed punch forms. However, Tate testified that she was directed to sign off by her nurse supervisor. There is no indication that the senior care givers takes any further action regarding these missed punched forms.

### **Secondary Indicia**

Senior care givers participate in informal on-the-job training of new care givers by taking them around and explaining to them their job duties. All care givers, punch a time clock, receive the same benefits, and are subject to the same employee handbook. The senior care givers receive \$1.00 per hour more than the other care givers. There is some indication in the record that the senior care givers attend some management meetings along with the RSC and nurse supervisors to discuss upcoming programs and staff and building concerns.

### **The Administrative Services Assistants**

The two administrative services assistants, Margaret Ferguson and Doris Henry, perform receptionist-like work. They are stationed at a desk located at the entrance to the facility. They are primarily responsible for answering incoming phone calls, greeting and assisting visitors, and observing ingress and egress. They also sort through and forward incoming resident mail and perform some limited clerical filing activities relating to accounts payable, resident, family, and financial files. Ferguson and Henry work 30 hours and 40 hours per week, respectively. They work rotating hours and either one of them is generally present at the facility from about 7:00 a.m. to about 8:00 p.m. They earn about \$8.50 to \$9.00 per hour, which is within the same pay range as the petitioned-for employees. They punch the same time clock and receive the same benefits as the petitioned-for employees. The administrative services assistants report to the administrative services coordinator.

Regarding interaction between the administrative services assistants and the petitioned-for employees, the administrative services assistants maintain certain forms at their desk, such as missed punch forms, which the petitioned-for employees may obtain from them. Regarding the overlap of duties, when the administrative services assistants are not on duty, the incoming phone calls are answered by the care givers. However, on

those occasions, the calls automatically go to the nursing department. Infrequently, care givers might answer phone calls at the administrative services assistant desk when she is not available.

## Analysis

### Senior Care Givers

Section 2(3) of the Act excludes from the definition of the term “employee” “any individual employed as a supervisor.” Section 2(11) of the Act defines a “supervisor” as:

Any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not merely of a routine or clerical nature, but requires the use of independent judgment.

Section 2(11) is to be interpreted in the disjunctive and the possession of any one of the authorities listed in that section places the employees invested with this authority in the supervisory class. *Allen Services Co.*, 314 NLRB 1060, 1061 (1994); *Ohio Power Co. v. NLRB*, 176 F.2d 385 (6<sup>th</sup> Cir. 1949), cert. denied 338 U.S. 899(1949). However, the Board is mindful not to deprive employees of their rights under Section 7 by interpreting the term supervisor too broadly. *Azusa Ranch Market*, 321 NLRB 811, 812 (1996).

In *NLRB v. Kentucky River Community Care*, 532 U.S. 706 (2001), the Supreme Court upheld the Board’s longstanding rule that the burden of proving Section 2(11) supervisory status rests with the party asserting it. See *Ohio Masonic Home*, 295 NLRB 390, 393 fn. 7 (1989); *Bowne of Houston, Inc.*, 280 NLRB 1222, 1223 (1986). However, the Court rejected the Board’s interpretation of “independent judgment” in Section 2(11)’s test for supervisory status, i.e., that nurses will not be deemed to have used “independent judgment” “when they exercise “ordinary professional or technical judgment in directing less-skilled employees to deliver services in accordance with employer-specific standards.” 532 U.S. at 707. Although the Court found the Board’s interpretation of “independent judgment in this respect to be inconsistent with the Act, it recognized that it is within the Board’s discretion to determine, within reason, what scope or degree of “independent judgment” meets the statutory threshold. *Id.* at 714-715. Further, the Court acknowledged that the term “independent judgment” is ambiguous as to the degree of discretion required to establish supervisory status and that such degree of judgment “that might ordinarily be required to conduct a particular task may be reduced below the statutory threshold by detailed orders and regulations issued by the employer.” *Id.* at 713-714.

In discussing the tension in the Act between the Section 2(11) definition of supervisor and the Section 2(12) definition of professional, the Court left open the question of the interpretation of the Section 2(11) supervisory function of “responsible direction,” noting the possibility of “distinguishing employees who direct the manner of others’ performance of discrete tasks from employees who direct other employees.” *Id.* at 720; See *Majestic Star Casino*, 335 NLRB 407, 408 (2001). For instance, direction as to a specific and discrete task falls below the supervisory threshold if the use of independent judgment and discretion is circumscribed by the superior’s standing orders and the employer’s operating regulations, which require the individuals to contact a superior when problems or anything unusual occurs. *Dynamic Science, Inc.*, 334 NLRB 391 (2001); *Chevron Shipping Co.*, 317 NLRB 379, 381 (1995).

In the instant case, job assignments made to the care givers are routine in nature and do not change. The limited authority, if any, of the senior care givers in assigning discrete tasks to less skilled employees based on standing orders does not require the use of independent judgment in the direction of other employees. *Ferguson Electric Co.*, 335 NLRB 142, 147 (2001). Furthermore, the evidence suggests that the assignments are routine in nature, and are based mainly on principles of fairness and even distribution of work. *Byers Engineering Corp.*, 324 NLRB 740, 741 (1997).

For the most part, the shifts are adequately staffed with care givers and the senior care givers act as a float among the houses. They typically follow up on the work of the care givers to ensure that their duties are being performed correctly. If they notice an error or omission they will point it out to the care giver and may note it for review by a higher supervisory official. However, there is no indication in the record that the senior care givers participate in any way in the disciplinary or evaluation processes of the care givers or that the Employer utilizes their noted observations in those processes to affect employees’ status or tenure. The senior care givers’ observations are not in any way a recommendation of reward or discipline and are, at most, akin to a progress report. This is not supervisory. *Custom Mattress Mfg.*, 327 NLRB 111 (1998); *Ten Broeck Commons*, 320 NLRB 806, 813 (1996); *Passavant Health Center*, 284 NLRB 887 (1987). It does not appear that the senior care givers’ involvement in directing the care givers while on rounds entails the use of independent judgment required to confer supervisory status.

When the resident services coordinator or nurse supervisor is on duty, the senior care giver is generally not involved in scheduling issues. Thus, it appears that the day and afternoon shift senior care givers are generally not involved in calling in employees to correct staffing shortages. However, the involvement of the midnight shift senior care giver in staffing assignments and her independent authority to call in employees at her own discretion when understaffed is potentially an indication of supervisory authority. Only the day shift senior care giver testified at the hearing regarding the issue of calling in employees. The record does not indicate how often employees have to be called in or

whether the midnight shift senior care giver calls the nurse supervisor for consultation about whether to call additional care givers into work or let care givers go home early. Rather, although the midnight shift senior care giver did not testify, the evidence suggests that she makes independent scheduling decisions regarding calling in employees. This power to authorize schedule changes and reassign employees arguably rises above the mere incidental direction of less skilled employees. See e.g. ***Cedar Ridge Nursing and Rehabilitation Center v. NLRB***, 147 F. 3d 333 (4<sup>th</sup> Cir. 1998).

Although there is a nurse always on-call, the afternoon and midnight shift senior care givers are the highest ranking employees on the premises for substantial periods during their shifts. The absence of other supervision is one of the secondary indicia which may be considered in establishing supervisory status. See ***Essbar Equipment Co.***, 315 NLRB 461 (1994). However, as a secondary indicia, standing alone, without evidence of primary indicia, it is insufficient to establish supervisory status. See ***Juniper Industries***, 311 NLRB 109, 110 (1993).

The senior care givers' responsibility in the area of discipline is solely to serve as a conduit by reporting misbehavior. Although the record evidence is limited regarding this issue, it appears that higher management independently investigates and determines penalties for misconduct and the record is void of any evidence suggesting that senior care giver recommendations are elicited in the process. The Board has repeatedly held, with court approval, that a reportorial function is not sufficient to support a supervisory finding. ***Ohio Masonic Home***, supra at 394; ***NLRB v. Attleboro Associates, Ltd.***, 176 F.3d 154, 174 (3<sup>rd</sup> Cir. 1999); ***NLRB v. Grancare, Inc.***, 170 F.3d 662, 668 (7<sup>th</sup> Cir. 1999); ***NLRB v. City Yellow Cab Co.***, 344 F.2d 575, 580-581 (6<sup>th</sup> Cir., 1965).

Although there is limited and speculative record evidence regarding an afternoon shift senior care giver sending a care giver home on one occasion, there is no indication as to the follow-up discipline, if any, of this employee. At any rate, possessing authority to take limited action in response to flagrant violations is insufficient by itself to establish supervisory status. ***Phelps Community Medical Center***, 295 NLRB 486, 491- 492 (1989); ***Loffland Bros. Co.***, 243 NLRB 74, 75 fn 4 (1979).

The Employer relies on several other indicia of supervisory status. As already noted, the existence of secondary indicia of supervisory status, such as the possession of keys, title, higher pay, and the alike are, standing alone, insufficient to demonstrate supervisory status. ***Shen Automotive Dealership Group***, 321 NLRB 586, 594 (1996); ***Billows Electric Supply***, 311 NLRB 878 fn. 2 (1993). However, in the instant case, with respect at least to the midnight shift senior care giver, the existence of secondary indicia along with the authority to call in employees is not insignificant. There is some indication in the record that the senior care givers attend some management meetings along with the resident services coordinator and nurse supervisors to discuss upcoming programs and staff and building concerns. The senior care givers earn a premium of

\$1.00 per hour. The senior care givers participate in informal on-the-job training of new care giver employees.

Presumably, the senior care givers work five days a week. However, only the day shift senior care giver testified at the hearing regarding staffing issues and the record is silent as to the staffing of the care givers and who is in charge at the facility during part of the afternoon shift and the midnight shift when the senior care givers are off. Finally, the ratio of supervisors to employees is not significantly affected by whether or not the senior care givers are found to be supervisors.

Overall, I find that the record is insufficiently conclusive to permit a ruling regarding the asserted supervisory status of the senior care givers and particularly the midnight shift senior care giver. As the record fails to demonstrate with specificity whether these three employees each fall within the supervisory parameters of Section 2(11), the senior care givers will be allowed to vote subject to challenge by either party.

### **Administrative Service Assistants**

As a general rule, business office clerical employees are excluded from customary service and maintenance units. *Ansted Center*, 326 NLRB 1208, 1211 (1998) and cases cited therein. However, receptionists have been included in health care service and maintenance units where they do not perform distinct business office duties such as handling finances, billing, and extensive personnel functions. *Id*; *Lincoln Park Nursing and Convalescent Home*, 318 NLRB 1160, 1164 (1995); *Charter Hospital of Orlando South*, 313 NLRB 951 (1994).

The administrative services assistants do not handle finances and billing, or deal with Medicare, Medicaid, or other reimbursement systems. They work in the lobby at the point where visitors come into the facility, and they are not physically isolated in a business office<sup>6</sup>. That the administrative services assistants may have only minimal contact with petitioned-for employees does not preclude them from being in the petitioned-for unit. Nor is their lack of involvement in patient care determinative, because the petitioned-for unit includes other employees not involved in patient care, cooks and housekeepers. I conclude that the administrative services assistants are akin to receptionists and I shall include them in the unit. See *Lincoln Park Nursing and Convalescent Home*, supra at 1164-1165; *Charter Hospital of Orlando South*, supra at 951.

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<sup>6</sup> The Employer's list of employees working at the instant facility does not include any business clerical employees. It appears that the Employer's business office may be located at another Employer facility.

5. Accordingly, I find that the following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time service and maintenance employees, including cooks, housekeepers, program service assistants, administrative service assistants, and resident care givers employed by the Employer at its facility located at 32500 Seven Mile Road, Livonia, Michigan; but excluding all registered nurses (RNs), licensed practical nurses (LPNs), managers, office clerical employees, and guards and supervisors as defined in the Act.

Those eligible shall vote as set forth in the attached Direction of Election.

Dated at Detroit, Michigan, this 1<sup>st</sup> day of December 2003.

(SEAL)

/s/ Stephen M. Glasser  
Stephen M. Glasser, Regional Director  
National Labor Relations Board – Region 7  
Patrick V. McNamara Federal Building  
477 Michigan Avenue – Room 300  
Detroit, Michigan 48226

Classifications

177-8540-8050

177-8540-8580

470-5000

470-5080

470-6760

## **DIRECTION OF ELECTION**

An election by secret ballot shall be conducted under the direction and supervision of this office among the employees in the unit(s) found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those employees in the unit(s) who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such a strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Employees who are otherwise eligible but who are in the military service of the United States may vote if they appear in person at the polls. Ineligible to vote are 1) employees who quit or are discharged for cause after the designated payroll period for eligibility, 2) employees engaged in a strike, who have quit or been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and 3) employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by:

## **LIST OF VOTERS**

In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969); *North Macon Health Care Facility*, 315 NLRB 359 (1994). Accordingly, it is hereby directed that within 7 days of the date of this Decision, **2** copies of an election eligibility list, containing the full names and addresses of all the eligible voters, shall be filed by the Employer with the undersigned who shall make the list available to all parties to the election. The list must be of sufficient clarity to be clearly legible. The list may be submitted by facsimile transmission, in which case only one copy need be submitted. In order to be timely filed, such list must be received in the **DETROIT REGIONAL OFFICE** on or before **December 8, 2003**. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

## **RIGHT TO REQUEST REVIEW**

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the **Executive Secretary, Franklin Court, 1099 14th Street N.W., Washington D.C. 20570**. This request must be received by the Board in Washington by **December 15, 2003**.

## **POSTING OF ELECTION NOTICES**

a. Employers shall post copies of the Board's official Notice of Election in conspicuous places at least 3 full working days prior to 12:01 a.m. of the day of the election. In elections involving mail ballots, the election shall be deemed to have commenced the day the ballots are deposited by the Regional Office in the mail. In all cases, the notices shall remain posted until the end of the election.

b. The term "working day" shall mean an entire 24-hour period excluding Saturday, Sundays, and holidays.

c. A party shall be stopped from objecting to nonposting of notices if it is responsible for the nonposting. An employer shall be conclusively deemed to have received copies of the election notice for posting unless it notifies the Regional Office at least 5 days prior to the commencement of the election that it has not received copies of the election notice. \*/

d. Failure to post the election notices as required herein shall be grounds for setting aside the election whenever proper and timely objections are filed under the provisions of Section 102.69(a).

\*/ Section 103.20 (c) of the Board's Rules is interpreted as requiring an employer to notify the Regional Office at least 5 full working days prior to 12:01 a.m. of the day of the election that it has not received copies of the election notice.